



## CONSUMER PRODUCT SAFETY COMMISSION

(CPSC Docket No. 12-C0007)

Battat Incorporated, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission

ACTION: Notice

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the Federal Register in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with Battat Incorporated, containing a civil penalty of \$400,000.00, within twenty (20) days of service of the Commission's final Order accepting the Settlement Agreement.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by (insert date that is 15 calendar days from publication date).

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to the Comment 12-C0007, Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Room 820, Bethesda, Maryland 20814-4408.

FOR FURTHER INFORMATION CONTACT: Sarah C. Wang, General Attorney, Division of Enforcement and Information, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, Maryland 20814-4408; telephone (301) 504-

7807. SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

July 17, 2012

Signed:        Todd A. Stevenson  
                 Secretary

**UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION**

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In the Matter of:

Battat Incorporated

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CPSC Docket No.: 12-C0007

**SETTLEMENT AGREEMENT AND ORDER**

1. In accordance with 16 CFR 1118.20, Battat Incorporated (“Battat” or the “Firm”) and staff (“Staff”) of the United States Consumer Product Safety Commission (“Commission” or “CPSC”) hereby enter into this Settlement Agreement (“Agreement”) under the Consumer Product Safety Act (“CPSA”). The Agreement and the incorporated attached Order resolve Staff’s allegations set forth below.

**THE PARTIES**

2. Staff is the staff of the Commission, an independent federal regulatory agency established pursuant to, and responsible for, enforcement of the CPSA, 15 U.S.C. §§ 2051–2089.

3. Battat is a privately-held company, organized and existing under the laws of the state of Delaware, with its principal office located at 1560 Military Turnpike, Plattsburgh, New York, 12901.

**STAFF ALLEGATIONS**

4. Between August 2004 and February 2008, Battat distributed approximately 132,000 Magnabild magnetic building sets (“Subject Products”) in U.S. commerce. On January 23, 2008, Battat announced a recall for the Subject Products bearing model numbers BB1431H

and BB1502H. On March 13, 2008, Battat announced a recall for the Subject Products bearing model numbers BB1439H and BAT-34. The Subject Products sold for approximately \$20 – \$40 through online and nationwide retailers.

5. The Subject Products are “consumer products” and, at all relevant times, Battat was a “distributor” of these consumer products, which were “distribute[d] in commerce,” as those terms are defined or used in sections 3(a)(5), (7), and (8) of the CPSA, 15 U.S.C. § 2052(a)(5), (7), and (8).

6. The Subject Products, which are labeled for ages three and up, are defective because small, powerful magnets can loosen and fall out of the components with normal use. Magnets found by young children can be swallowed or aspirated. If more than one magnet is swallowed, the magnets can attract each other and cause intestinal perforations or blockages, which can be fatal.

7. Battat received its first complaint of magnets coming loose from the Subject Products in October 2005.

8. By March 31, 2006, Battat had received seven consumer reports of magnet liberation and two consumer reports of children ingesting non-magnetized steel balls. Some consumers described multiple magnet liberations from the Subject Products.

9. On March 31, 2006, the Commission announced the recall of Rose Art Magnetix Building Sets, which involved one death, four serious injuries, and 34 incidents involving small magnets.

10. In April 2006, Battat received two additional consumer complaints of magnet liberation. Battat has represented to the Commission that, “At some point, likely April or May

[2006], Battat became aware of the Magnetix recall and only then became aware of the possibility that small magnets could cause intestinal injury.”

11. Between November 2006 and July 2007, the Commission re-announced the Rose Art Magnetix Building Sets recall due to additional serious injuries to children; the Commission issued a “Magnet Safety Alert,” warning parents of the risk of serious injury and death to children from magnet ingestion; and the Commission announced five separate recalls for several million toys containing magnets due to the potential for magnet liberation.

12. Despite being aware of the danger posed to children by the ingestion of magnets such as those in the Subject Products, and with full awareness that the CPSC and industry were actively working to address the hazards posed to children by the ingestion of magnets, Battat failed to notify the CPSC or inform consumers of the Subject Products’ defect and resulting potential hazard.

13. Staff contacted Battat on July 9, 2007, to request a full report pursuant to CPSA section 15(b) (“Section 15 Report”). With this request, Staff enclosed two in-depth investigation reports of consumer reports describing magnets liberating from the Subject Products.

14. Battat did not immediately provide the requested Section 15 Report on the Subject Products. As a result, Staff reiterated its request at least two more times from July 2007 to October 2007. Battat did not file the requested Section 15 Report on the Subject Products until October 12, 2007, after at least three requests from Staff.

15. Battat failed to inform the Commission of the defect and resulting potential hazard present in the Subject Products bearing model numbers BB1431H and BB1502H until October 12, 2007. Subject Products bearing those model numbers were recalled on January 23, 2008.

16. The January 23, 2008, recall did not encompass all Subject Products posing the magnet liberation hazard in U.S. commerce. Battat failed to inform the Commission of the defect and resulting potential hazard in two additional models of the Subject Products, those bearing model numbers BB1439H and BAT-34, until it filed an additional Section 15 Report on February 11, 2008.

17. Although Battat had obtained sufficient information to reasonably support the conclusion that the Subject Products contained a defect that could create a substantial product hazard, or created an unreasonable risk of serious injury or death, Battat failed to inform the Commission immediately of such defect or risk, as required by sections 15(b)(3) and (4) of the CPSA, 15 U.S.C. § 2064(b)(3) and (4). In failing to inform the Commission immediately of the defect or advising that the defect involved the Subject Products, Battat knowingly violated section 19(a)(4) of the CPSA, 15 U.S.C. § 2068(a)(4), as the term “knowingly” is defined in section 20(d) of the CPSA, 15 U.S.C. § 2069(d).

18. Pursuant to section 20 of the CPSA, 15 U.S.C. § 2069, Battat is subject to civil penalties for its knowing failure to report, as required under section 15(b) of the CPSA, 15 U.S.C. § 2064(b).

#### RESPONSE OF BATTAT

19. Battat denies Staff’s allegations that Battat knowingly or otherwise violated the reporting requirements of section 15(b) of the CPSA, 15 U.S.C. 2064(b). Battat further disputes the staff position that Battat obtained information that reasonably supported the conclusion that the subject products contain a defect that could create a substantial product hazard or create an unreasonable risk of serious injury or death.

20. The Magnabild toys were manufactured in 2004 and 2005 and tested to all existing CPSC safety standards, including the use and abuse testing requirements used by CPSC

and the toy industry to determine whether toys would break during reasonably foreseeable use and abuse. Furthermore, the Magnabild toys were labeled “Warning: Choking Hazard; Toy Contains Small Parts & Small Balls; Not For Children Under 3 years.”

21. When Battat learned about the Magnetix recall, it examined its product to determine whether its product presented the same risks as the Magnetix toys and concluded that it did not because most of the Magnabild products did not contain the small magnets that were present in the Magnetix products and Battat believed its magnets were better retained in its toys and much less likely to come out even under foreseeable misuse and abuse. Unlike the Magnetix product that used only tiny magnets, Battat’s predominant magnetic component was a one inch magnet molded into a full-length plastic sheath.

22. Battat had received very few complaints of magnets coming out of its Magnabild toys and no reports of injury, unlike other manufacturers whose products—according to CPSC press releases and legal documents—had released well over a thousand magnets and allegedly caused a death and more than two dozen serious intestinal injuries.

23. At some point before being contacted by CPSC in July 2007, Battat became aware that CPSC was working prospectively on a labeling rule for magnet toys with ASTM that allowed the sale of loose magnets, as long as a warning label was present telling consumers about the risk of infection and death from magnets sticking together across intestines. Battat did not use loose magnets in its toy and had received very few complaints of magnet release. Battat believed that its existing warning label about a choking hazard was likely to be no less effective at advising parents to keep the product away from small children.

24. Battat did not receive any complaints about magnets coming out of its toys for a period of approximately 14 months before it was contacted by the CPSC in July 2007 and had

not received any reports about magnet ingestion or injury. This increased the firm's confidence that it did not have a significant problem with magnets coming out of its Magnabild toys.

25. From the time it was first contacted by the CPSC compliance staff, Battat believed that the CPSC staff was adequately informed of the alleged defect or risk in its product. Battat knew that CPSC had samples of the Magnabild product and had investigated incidents where magnets allegedly came out. Further, the staff contended the product presented a substantial product hazard and sought a recall. Battat made its "full report" in October 2007 to provide details of its recall proposal. Although Battat did not agree with the CPSC staff view of the alleged hazard, Battat agreed to recall 125,000 Magnabild toy sets, 84,430 of which had only the one inch rod magnets Battat believed would not come out of their sheathes.

26. In February 2008, Battat learned that another 7,000 Magnabild products in models BB1439H and BAT 34, had been shipped to the United States by the Chinese manufacturer several years before. Although both of these models only contained the fully sheathed one inch magnets Battat believed would not come out, Battat reported its discovery to CPSC and offered to recall these products as well. In total, only 31% of the 132,000 total units Battat ultimately recalled had any small magnets and Battat believed they were well retained in the Battat design.

27. Battat believes its judgment that the Magnabild product did not contain reportable defects or unreasonable risks was reasonable. That judgment was supported by technical and design differences from products that experienced large numbers of failures and caused injuries. Battat's judgment has been further borne out by the lack of any injuries associated with magnets coming out of Magnabild toys and by a lack of reports of magnet release for several years since its recall. Battat settles this matter not because it has violated the reporting obligation in section 15(b) of the CPSA, or because it believes the settlement amount is reasonably related to the

statutory criteria for penalties set forth in the CPSA, but to avoid the negative publicity associated with CPSC pursuit of a penalty through litigation and the costs and interference with its business activities that would likely result from such litigation even if pursued to a successful conclusion.

#### AGREEMENT OF THE PARTIES

28. The CPSC has jurisdiction over this matter under the CPSA and for the purposes of this settlement agreement only, over Battat.

29. In settlement of Staff's allegations, and while specifically and strenuously denying those allegations, Battat consents to the entry of the attached Order ("Order") as set forth below and will pay a civil penalty in the amount of four hundred thousand dollars (\$400,000.00) over a period of 12 months of the date this Order becomes final. The payment shall be made to the CPSC via [www.pay.gov](http://www.pay.gov) with equal installments of \$100,000.00 paid quarterly starting within 20 days of service upon Battat of the final Order in this matter.

30. The parties further agree that if Battat fails to make timely payments as agreed to in paragraph 29, such conduct will be considered a violation of this Agreement and Order.

31. The parties enter into this Agreement for settlement purposes only. The Agreement does not constitute an admission by Battat or a determination by the Commission that Battat violated the CPSA's reporting requirements. This agreement completely and finally resolves the staff allegations set forth in paragraphs 2-18 with respect to Battat Incorporated, and its officers, directors, and related companies.

32. Upon provisional acceptance of the Agreement by the Commission, the Agreement shall be placed on the public record and published in the *Federal Register*, in accordance with the procedures set forth in 16 C.F.R. § 1118.20(e). If the Commission does not receive any written request not to accept the Agreement within fifteen (15) calendar days, the

Agreement shall be deemed finally accepted on the 16<sup>th</sup> calendar day after the date it is published in the *Federal Register*, in accordance with 16 CFR 1118.20(f).

~~33.~~ Upon the Commission's final acceptance of the Agreement and issuance of the Order, Battat knowingly, voluntarily, and completely waives any rights it may have in this matter to the following: (a) an administrative or judicial hearing; (b) judicial review or other challenge or contest of the Commission's actions; (c) a determination by the Commission of whether Battat failed to comply with the CPSA and the underlying regulations; (d) a statement of findings of fact and conclusions of law; and (e) any claims under the Equal Access to Justice Act.

34. The Commission may publicize the terms of the Agreement and the final Order.

35. The Agreement and the final Order shall apply to, and be binding upon, Battat, and each of its successors and/or assigns, until the obligations described in paragraph 29 has been fulfilled to the satisfaction of the Commission.

36. The Commission issues the final Order under the provisions of the CPSA, and a violation of the final Order may subject Battat, and each of its successors and/or assigns, to appropriate legal action.

37. The Agreement may be used in interpreting the final Order. Understandings, agreements, representations, or interpretations apart from those contained in the Agreement and the Order may not be used to vary or contradict the terms of the Agreement and the final Order. The Agreement shall not be waived, amended, modified, or otherwise altered without written agreement thereto, executed by the party against whom such waiver, amendment, modification, or alteration is sought to be enforced.

38. If any provision of the Agreement or the final Order is held to be illegal, invalid, or unenforceable under present or future laws effective during the terms of the Agreement and

the final Order, such provision shall be fully severable. The balance of the Agreement and the final Order shall remain in full force and effect, unless the Commission and Battat agree that severing the provision materially affects the purpose of the Agreement and final Order.

39. This Agreement may be executed in counterparts.

Battat Incorporated

Dated: June 27, 2012

By: \_\_\_\_\_  
Joseph Battat

Dated: June 27, 2012

By: \_\_\_\_\_  
Anthony T. Pavel, Jr.  
Counsel to Battat Incorporated  
K&L Gates LLP  
1601 K Street NW  
Washington, D.C. 20006-1600

U.S. CONSUMER PRODUCT SAFETY  
COMMISSION STAFF

Cheryl A. Falvey  
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Mary B. Murphy  
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Dated: July 12, 2012

By: \_\_\_\_\_  
Sarah C. Wang, Trial Attorney  
Division of Compliance  
Office of the General Counsel

**UNITED STATES OF AMERICA  
CONSUMER PRODUCT SAFETY COMMISSION**

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In the Matter of:

Battat Incorporated

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CPSC Docket No.: 12-C0007

**ORDER**

Upon consideration of the Settlement Agreement entered into between Battat, Incorporated (“Battat”), and U.S. Consumer Product Safety Commission (“Commission”) staff, and the Commission having jurisdiction over the subject matter and over Battat, and it appearing that the Settlement Agreement and the Order are in the public interest, it is

**ORDERED** that the Settlement Agreement be, and is, hereby, accepted; and it is

**FURTHER ORDERED**, that Battat shall pay a civil penalty in the amount of four hundred thousand dollars (\$400,000.00) within 12 months of service of the Commission’s Order upon counsel for Battat, identified in the Settlement Agreement. The payments shall be made electronically to the CPSC via [www.pay.gov](http://www.pay.gov) in equal quarterly installments of \$100,000.00 commencing within 20 days of service upon Battat of this final order. Upon the failure of Battat to make the foregoing payments when due, interest on the unpaid amount shall accrue and be paid by Battat at the federal legal rate of interest set forth at 28 U.S.C. § 1961(a) and (b). If Battat fails to make such payments, as set forth in the Settlement Agreement, such conduct will be considered a violation of this Agreement and Order.

Provisionally accepted and provisional Order issued on the 13<sup>th</sup> day of July, 2012.

**BY ORDER OF THE COMMISSION:**

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Todd A. Stevenson, Secretary  
U.S. Consumer Product Safety Commission

[FR Doc. 2012-17704 Filed 07/19/2012 at 8:45 am; Publication Date: 07/20/2012]